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Report of the Special Rapporteur on minority issues

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on minority issues, Fernand de Varennes, prepared pursuant to Human Rights Council resolution 34/6, which extended the mandate under the same terms as provided for in resolution 25/5.

The report is the first one submitted to the Council by Mr. de Varennes in his capacity as Special Rapporteur. It provides a summary of the activities undertaken by the mandate holder since he assumed his functions on 1 August 2017 and outlines his main priorities and vision for the mandate. The report also contains a review of the activities of the previous mandate holder, Rita Izsák-Ndiaye, from January to July 2017.

In the report, the Special Rapporteur gives an update on the work of the tenth Forum on Minority Issues, held on 30 November and 1 December 2017, entitled "Minority youth: towards inclusive and diverse societies". He highlights the crucial role that minority youth play in advocating for and protecting the rights of minorities, particularly through the use of digital media and various social media platforms. He underscores the importance of including minority youth in decision-making processes, which transform them into active agents of change in their respective contexts.

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I. Introduction

1. The mandate of the Special Rapporteur on minority issues was established by the Commission on Human Rights in its resolution 2005/79 of 21 April 2005. It was subsequently extended by the Human Rights Council in successive resolutions, the most recent being resolution 34/6 which extended the mandate under the same terms as provided for in resolution 25/5.

2. The Special Rapporteur, Fernand de Varennes of Canada, was appointed by the Council on 26 June 2017 and assumed his functions on 1 August 2017. His term in office may be renewed for two three-year periods.

3. The Special Rapporteur is honoured to be entrusted with the mandate and thanks the Council for its trust in him. He also wishes to thank the Office of the United Nations High Commissioner for Human Rights (OHCHR) for its support in the implementation of the mandate.

4. The present report is the first one submitted by the Special Rapporteur to the Human Rights Council. In it, he outlines his main priorities and vision for the mandate, which include promoting the implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (the Declaration on the Rights of Minorities) through consultations with governments and other stakeholders. To that end, he will take into account existing international standards and national legislation concerning minorities and will identify best practices by States and possibilities for technical cooperation with OHCHR.

5. The report contains eight substantive sections. Section II provides an overview of the activities of the previous Special Rapporteur from January to July 2017; section III covers the activities of the current Special Rapporteur from August to December 2017; section IV sets out the priorities and vision that will guide his mandate; section V summarizes the communication activities of the mandate in 2017; section VI presents the results of the research on minority issues in the second cycle of the universal periodic review; section VII details the aims of the new practical guide for the implementation of the language rights of linguistic minorities; and section VIII provides an update of the tenth Forum on Minority Issues, held on 30 November and 1 December 2017. The final section of the report contains conclusions and insights on the Special Rapporteur's mandate.

6. The Special Rapporteur would like to thank his predecessor, Rita Izsák-Ndiaye — whose second three-year term ended on 31 July 2017 — for promoting and advocating for the rights of minorities over the past six years. She has contributed greatly to the effective implementation of the Declaration on the Rights of Minorities and to fostering a better understanding of several crucial areas affecting the rights of minorities. Through a wide consultative process, focusing primarily on increasing ownership of their rights by minorities themselves, she has enhanced their visibility and increased the engagement of the international community and the United Nations, in particular, in tackling the challenges they face. Those efforts were consolidated through eight country visits, which helped to shed light on a number of critical issues faced by minorities in different contexts.

II. Activities of the previous Special Rapporteur (January–July 2017)

7. On 28 February 2017, the previous Special Rapporteur on minority issues, Rita Izsák-Ndiaye, delivered a statement in the context of a side event to mark the twenty-fifth anniversary of the Declaration on the Rights of Minorities. The event was co-hosted by Minority Rights Group International and the Permanent Mission of Austria to the United Nations Office and specialized institutions in Geneva and focused on the importance of a minority rights approach in combating radicalization and violent extremism. Participants in the event also explored ways in which minority inclusion and participation in all aspects of public life could be an effective approach in combating violence and hate speech.

8. On 16 March 2017, the previous Special Rapporteur participated as a panellist in a side event entitled "Minorities and caste-based discrimination". The event was inspired by her report to the Human Rights Council,[1] in which she considered caste discrimination in a global context.

9. On 17 March 2017, during the thirty-fourth session of the Human Rights Council, the previous Special Rapporteur moderated a side event organized by OHCHR and the mandate. The handbook, *Language Rights of Linguistic Minorities: A Practical Guide for Implementation* (2017),[2] was launched at that event.

10. Also in March 2017, the previous Special Rapporteur attended the launch of the publication, *Guidance Tool on Descent-Based Discrimination: Key Challenges and Strategic Approaches to Combat Caste-Based and Analogous Forms of Discrimination* (2017),[3] in Nepal. The event was organized by OHCHR and focused on strengthening the capacity of the United Nations country team in Nepal to promote anti-discrimination.

11. On 7 July 2017, the previous Special Rapporteur participated in an intersessional seminar on cultural rights and the protection of cultural heritage. The event was organized by OHCHR, with the aim of engaging with a number of stakeholders on the means to prevent and contain the detrimental impact of the damage to and destruction of cultural heritage on the enjoyment of human rights. Participants included representatives of member States, United Nations agencies, civil society organizations, national human rights institutions and cultural rights defenders.

III. Activities of the Special Rapporteur (August–December 2017)

12. As of September 2017, the Special Rapporteur started a thorough consultation process with a number of stakeholders, including governments, non-governmental organizations (NGOs), national human rights institutions and representatives of various minorities, with a view to strengthening existing working relationships and exploring new means for engagement with the mandate.

13. In his consultations, the Special Rapporteur highlighted the fact that, in many countries, minorities were among the world's most vulnerable segments of society and were currently confronted with an increasing number of human rights challenges and threats, ranging from discrimination linked to their languages, religion or ethnicity to violence and hate speech. He stressed that these challenges required concerted, collective and determined action by all concerned. He underscored the need to further understand the human rights issues surrounding the marginalization and vulnerability of minorities and for collaborative and timely responses to mitigate the threats that they faced. This was particularly true in the case of minority women who may find themselves doubly marginalized because of their gender and for being a member of a linguistic, religious or ethnic minority.

14. The Special Rapporteur understands the need to redress existing injustices facing minorities — such as long-standing and systemic discriminatory practices — and at the same time deal with emerging crises that are engulfing minorities. He initiated wide-ranging consultation with various members of minority communities to ensure that their views, expectations and grievances were not only integrated into the priorities of the mandate, but would also be addressed at the relevant national, regional and international levels. The Special Rapporteur will ensure that exchanges with minority groups are continuous. He will also ensure the inclusion of a strong gender dimension in his work, as provided for in the resolution establishing the mandate and subsequent resolutions.

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[1] A/HRC/31/56.

[2] See www.ohchr.org/Documents/Issues/Minorities/SR/LanguageRightsLinguisticMinorities_EN.pdf. The handbook was prepared by the Special Rapporteur.

[3] See www.ohchr.org/Documents/Issues/Minorities/GuidanceToolDiscrimination.pdf. The guidance tool was prepared by the United Nations Network on Racial Discrimination and Protection of Minorities.

15. The Special Rapporteur wishes to thank the States that had accepted visits by previous mandate holders for their good offices and cooperation, and encourages other States, including those to which requests for visits have been made, to engage positively with the mandate. Country visits have helped in addressing fundamental issues pertaining to minorities and in creating effective communication channels to bring together the means to improve technical cooperation and respond to the need to capitalize on existing and evolving positive practices. In addition to country visits, the Special Rapporteur will ensure continuous and consistent exchanges with member States on all matters relevant to the mandate.

16. The Special Rapporteur will focus on consultations with regional mechanisms, including the European Union, the Organization of Islamic Cooperation, the International Organization of la Francophonie, the Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, the Association of Southeast Asian Nations (ASEAN) Intergovernmental Commission on Human Rights, the Organization for Security and Cooperation in Europe (OSCE) and its High Commissioner on National Minorities, the African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights. Those consultations will help to develop focused and constructive discussions on cross-cutting regional issues affecting minorities, particularly as an increasing number of conflicts seem to be affecting minorities beyond national borders. The Special Rapporteur considers that regional cooperation has become increasingly important for the protection and promotion of the rights of minorities.

17. The Special Rapporteur will also focus some of his activities on advocacy and raising the profile of minorities in relation to a number of existing and emerging issues. In particular, he will seek to raise awareness about those issues through media interactions and to raise the visibility of the mandate through the use of available social media tools and allowing easier access to those tools by members of minorities. Particular emphasis will be given to the role of youth in using digital media to promote the rights of minorities in their respective contexts.

18. The mandate actively seeks to expose cases of violations of the rights of minorities. For this purpose, the Special Rapporteur has initiated a monthly tracking system to better follow-up on communications sent to governments, including letters of allegations and urgent appeals. The Special Rapporteur will also address all information received from civil society organizations, NGOs and members of minorities with regard to reported violations of the rights of minorities. He will make it a priority to engage with all stakeholders in that respect, in particular member States — the main duty bearers — to address urgent cases and other issues relating to long-standing discriminatory practices affecting minorities and violations of their rights.

19. Following up on the work of his predecessor who had carried out a comprehensive study of the human rights situation of Roma worldwide,[4] on 21 and 22 September 2017, the Special Rapporteur convened a workshop on the situation of Roma in the Americas, in Buenos Aires. He would like to take the opportunity herewith to thank the authorities in Argentina for agreeing to host the workshop.

20. The workshop provided a platform for Roma communities from Argentina, Brazil, Chile, Colombia and Peru to interact with each other, with officials from their respective countries and with representatives from regional human rights mechanisms, including OSCE and the Inter-American Commission on Human Rights. Roma communities shared their experiences and discussed policies put in place by the respective countries with the aim of empowering Roma communities and addressing access to adequate housing, health care and education. Representatives of Roma communities noted that, in the Americas, there was little public recognition or acceptance of Roma as a distinct minority. Roma remained largely socially and economically marginalized and few official policies or programmes existed in the region to promote and protect Roma rights. State representatives referred to the itinerant lifestyles of Roma as the key obstacle in terms of their access to social services. However, discrimination as well as lack of formal documentation were the

[4] A/HRC/29/24.

key challenges in terms of access to education and health services. Roma communities in the region also continued to face challenges in accessing adequate housing. Roma who continued to maintain a travelling lifestyle had difficulties in finding adequate sites to set up camp, which could lead to discrimination by the authorities and eviction from camps. Furthermore, the inability to maintain cultural patterns of travelling was having a profoundly negative impact on Roma social and cultural patterns and means of subsistence across the region. For the large proportion of Roma communities in the Americas who no longer travelled, families often lived in situations of extreme poverty, lacking electricity, potable water and adequate sanitation.

21. The workshop addressed ways in which Roma communities could access regional and international human rights protection mechanisms to ensure systematic and continued engagement with the mandate of the Special Rapporteur on minority issues, as well as with other thematic mandates and the Inter-American Commission on Human Rights.

22. In his concluding remarks to the workshop, the Special Rapporteur encouraged the adoption of strategies and laws at the national level to eradicate discriminatory practices against Roma individuals and communities and to ensure that they had adequate access to health care, social services, employment and education. He also encouraged the promotion of communication amongst Roma rights organizations in other countries in the region and beyond, in order to enhance cooperation and synergies.

23. The participants in the workshop agreed to a number of action points and measures to promote and protect the rights of members of Roma communities in the Americas. Some of the action points submitted to the Special Rapporteur by the participants were as follows:

(a) Promotion of the implementation of International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169) and recognition of Roma as an ethnic group;

(b) The importance of regular visits by the Special Rapporteur to countries where Roma communities are present and face challenges;

(c) The need to continue advocating for public policies aimed at improving the living conditions of Roma in the Americas and the rest of the world;

(d) Articulation of plans with the Pan American Health Organization (PAHO)/World Health Organization (WHO) in order to ensure the inclusion of Roma in national health systems;

(e) Promotion of public policies on the full enjoyment of the right to adequate housing;

(f) The need to devise strategies to strengthen the participation of members of Roma communities in all areas affecting them, including through civil society organizations working specifically on the protection and promotion of their rights.

24. On 5 October 2017, the Special Rapporteur addressed the biannual meeting of the Association des ombudsmans et médiateurs de la francophonie, in Fredericton, Canada, with a presentation entitled "Minorités, droits linguistiques et droits humains: enjeux pour les Nations Unies et la Francophonie". He described the close links between the human rights of minorities and linguistic rights and emphasized the close relationship between prohibition of discrimination in education and access to services such as health care, and how this could lead to obligations, based on human rights standards, to use or provide services in indigenous languages in certain contexts.

25. On 24 October 2017, the Special Rapporteur participated as a speaker in a side event to the seventy-second session of the General Assembly, in New York. The event was co-hosted by the Permanent Mission of Austria, the Permanent Mission of the Republic of Slovenia and the Permanent Mission of Canada to the United Nations in New York, Minority Rights Group International and the Office of the United Nations High Commissioner for Refugees (UNHCR), to commemorate the twenty-fifth anniversary of the Declaration on the Rights of Minorities. The event underscored the urgency of the effective implementation of the Declaration and the protection of the rights of minorities worldwide, especially in the current context of heightened global challenges such as conflicts,

humanitarian crises, rising populism and hate speech, discrimination and rising ethno-nationalism. It also underscored an increasing trend whereby some minorities continued to be targeted as scapegoats for political, economic and social problems. Under those circumstances, the protection of the rights of minorities was often perceived as a threat to national unity and/or security. Minorities face discrimination, abuse and violence that can lead to extreme forms of identity-based violence, including genocide. The event stressed that upholding the human rights of minorities was key to conflict prevention, peacebuilding, social stability and cohesion. Specific reference was made to statelessness and the denial of citizenship rights to members of minorities, particularly in the context of conflict and migration, and the need to address the root causes and conditions that were contributing factors to statelessness. The event also stressed the need for States to take all appropriate measures to ensure the effective participation of minorities in all aspects of life and to develop inclusive frameworks and spaces for civil society organizations working for and with minorities. The participants in the commemorative event highlighted the need for minority issues to be included in the 2030 Agenda for Sustainable Development and to track the progress made by member States in that area so as to make sure that the central pledge, "leaving no one behind", was fulfilled.

26. On 25 October 2017, the Special Rapporteur on minority issues addressed the General Assembly for the first time in that capacity. He reflected on the vulnerability and marginalization of many minority groups around the world and presented his overall vision and priorities for the mandate for the next three years, noting in particular the critical and, at times, overlooked dimension that the rights of minorities are the human rights of some of the world's most vulnerable. A number of additional aspects were also explored, namely, the need to clarify the scope and meaning of the term "minority", the urgency for States to effectively renew their commitment to the Declaration on the Rights of Minorities in the light of its twenty-fifth anniversary, and ways in which economic benefits can accrue from the protection of the rights of minorities. He stressed that those areas could advance thinking and deepen understanding that could help to overcome the difficulties and uncertainties that challenged the effective protection of the human rights of minorities.

27. On 3 November 2017, the Special Rapporteur participated as a guest speaker in a round table on ancestral languages, identity and revitalization during the international conference, "Lost and Found in Transcultural and Interlinguistic Translation" at Université de Moncton, Canada. He gave an overview of the rights of minorities emanating from human rights treaties and the application of international law in areas such as culture and language of indigenous peoples in countries where they constitute a minority.

28. On 1 December 2017, the Special Rapporteur met with the 2017 Minority Fellows in Geneva. Among the issues discussed was the possibility of establishing a minority fellows "alumni" group which would enable the mandate to have access to the knowledge and experience of former minority fellows through their various activities.

29. On 4 December 2017, the Special Rapporteur contributed to the final drafting of the Human Rights and Election Standards Plan of Action, a joint initiative on human rights and election standards of OHCHR and the Carter Centre in Atlanta, United States of America. The aim of the initiative is to reflect on the elements of a human rights-based approach to elections and to advance strategies for collaboration between human rights experts and electoral practitioners at the national, regional and international levels. The Special Rapporteur's contribution related to areas in which issues could affect the effective participation of minorities in electoral processes.

30. On 9 December 2017, the Special Rapporteur attended a conference organized by the Latvian Human Rights Committee, in Riga, Latvia, to celebrate the twenty-fifth anniversary of the Declaration on the Rights of Minorities. He gave a presentation on the mandate and possible ways forward for the protection and promotion of the rights of minorities.

IV. Priorities and vision for the mandate

31. In his first speech to the General Assembly in October 2017, the Special Rapporteur emphasized his concern about the lack of clarity and the recurrent misunderstandings relating to several fundamental issues surrounding the rights of minorities. He indicated that ambiguities and uncertainties as to the status of minorities, in some cases, may impact negatively on the implementation of the Declaration and other human rights instruments affecting them. Accordingly, in order to effectively implement the thematic priorities of the mandate, the Special Rapporteur will explore the following:

(a) The scope and meaning of the term "minority" as contained in the Declaration on the Rights of Minorities and article 27 of the International Covenant on Civil and Political Rights;

(b) Renewing the commitments made by States in the light of the twenty-fifth anniversary of the Declaration on the Rights of Minorities, and improving the reach and effectiveness of the Forum on Minority Issues, especially as it celebrates its tenth anniversary;

(c) The economic benefits and advantages of protecting the rights of minorities.

32. In conformity with Human Rights Council resolution 25/5, in which the Council requested the mandate holder to apply a gender perspective in his or her work, the Special Rapporteur will continue to place a high priority on minority women, as did his predecessors. He will continue to address the challenges that minority women face, particularly in relation to marginalization, statelessness, denial of citizenship and the right to education, where they may find themselves doubly impacted because of their gender and minority status.

33. The Special Rapporteur will also build on the groundbreaking work carried out by his predecessors on the importance of addressing discrimination, exclusion and other violations of human rights involving caste-based and analogous systems of inherited status, particularly affecting the Dalit, Burakumin and other particularly vulnerable minorities such as Roma. He will also address issues pertaining to deaf and hearing impaired persons as members of linguistic minorities. During his country visits, the Special Rapporteur will reinforce the practice of holding consultations with members of those marginalized groups and communities so as to better address their needs.

34. The Special Rapporteur intends to collaborate more closely and share insights, information and experience with other United Nations agencies and human rights mechanisms closely connected to or relevant to the rights of minorities, including UNHCR and the Committee on the Elimination of Racial Discrimination.

35. As announced in his speech to the General Assembly in October 2017, the Special Rapporteur's four thematic priorities will focus on addressing issues involving statelessness and the denial of the rights of minorities in citizenship matters; the interrelationship between conflicts; minority rights and the promotion of inclusiveness and stability, which are central to the implementation of the Declaration on the Rights of Minorities; the critical challenges of tackling hate speech, xenophobic rhetoric and incitement to hatred against minorities; and the sometimes misunderstood human rights dimensions of education and the rights of minorities.

A. Statelessness and the human rights of minorities

36. In her 2008 annual report to the Human Rights Council, the independent expert on minority issues addressed in detail a number of thematic issues relating to the discriminatory denial or deprivation of citizenship as a tool for exclusion of national, ethnic, religious and linguistic minorities. In that regard, she stated as follows:

> Minorities often face discrimination and exclusion, and they struggle to gain access to their human rights, even under conditions of full and unquestioned citizenship. Denying or stripping them of citizenship can be an effective method of

compounding their vulnerability, and can even lead to mass expulsion. Once denied or deprived of citizenship, minorities are inevitably denied protection of their basic rights and freedoms, including minority rights as established in the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[5]

37. Stateless minorities are often doubly vulnerable. The discriminatory denial or removal of citizenship may have long-lasting and extreme consequences for the enjoyment of other rights and/or to access various services. In addition, women belonging to minorities may be further marginalized by gender-based discrimination in relation to the acquisition, change or retention of nationality and the conferral of nationality on their children.

38. Until recently, it was neither widely known nor appreciated that minorities were disproportionally impacted by practices relating to the denial of citizenship and statelessness. In a recent report, UNHCR stated that more than 75 per cent of the world's known stateless populations were minorities.[6] Minorities, therefore, make up most of the world's stateless population. As other reports have also noted, the disproportionate vulnerability of minorities to statelessness — as a result of state policies and legislation — "can leave them excluded from state structures, without the right to vote or access basic services such as healthcare or education. In extreme cases, statelessness may leave them vulnerable to violence and mass displacement."[7]

39. Ten years after the groundbreaking report of the first mandate holder, the Special Rapporteur would like to revisit this essential aspect as it continues to affect a large number of minorities. In line with his mandate of promoting the implementation of the Declaration on the Rights of Minorities and identifying best practices by States and possibilities for technical cooperation with OHCHR, the Special Rapporteur will explore the possibility of conducting extensive work in consultation with United Nations agencies, regional intergovernmental organizations and NGOs. During the course of 2018, he will look into the possibility of conducting a regional consultation on good practices and specific approaches to tackling the absence or denial of citizenship which disproportionately affects minorities. That initiative would be extremely important at this time as it is increasingly evident that the marginalization and disenfranchisement of minority groups is linked to underdevelopment and unrest, with potential significant consequences for both national and regional security in some areas of the world.

40. Accordingly, the Special Rapporteur will prepare a thematic report, building upon the significant efforts of various stakeholders, including UNHCR #IBelong Campaign to end statelessness by 2024,[8] which primarily aims to achieve equal access to nationality rights for minorities. Particular attention will be given to actions 1, 2, 4, 7 and 8 of the Global Action Plan to End Statelessness. Those are respectively: facilitating the naturalization or confirmation of nationality for stateless minorities resident in a State; allowing minority children to obtain the nationality of the country in which they were born if they would otherwise be stateless; eliminating discriminatory laws and practices that deny or deprive minorities of nationality on discriminatory grounds; ensuring universal birth registration to prevent statelessness; eliminating procedural and practical obstacles to the issuance or recognition of citizenship and identity papers. Focus on these aspects is in line with the Special Rapporteur's mandate to examine the means of overcoming obstacles to the full and effective realization of the rights of persons belonging to minorities.

[5] See A/HRC/7/23, summary.

[6] UNHCR, *"This is our home": Stateless minorities and their search for citizenship*, 2017 Statelessness Report, p. 1.

[7] Denial and Denigration: How Racism Feeds Statelessness, Minority Rights Group International, October 2017, http://stories.minorityrights.org/statelessness/home/.

[8] See www.unhcr.org/ibelong/.

B. Ethnic conflicts, minority rights and promoting inclusiveness and stability

41. In 2010, the mandate holder at the time presented her first report[9] to the General Assembly, in which she highlighted the history of the development of minority rights and the need to address tensions between minorities and the State and among various population groups. It is noteworthy that, at the time of the General Assembly's adoption of the Declaration on the Rights of Minorities by resolution 47/135 of 18 December 1992, the representative of Austria specifically acknowledged that the implementation of the declaration would contribute to overcoming situations of tension relating to minority issues.[10]

42. The report of the first mandate holder could also be considered ground breaking as it clearly set out, for the first time, what the essential elements of a strategy to prevent conflicts involving minorities were: "respect for minority rights; dialogue between minorities and majorities within societies; and the constructive development of practices and institutional arrangements to accommodate diversity within society".[11]

43. Despite the perspicacity of her report, new conflicts involving minorities have emerged in many different parts of the world, including Cameroon, Central African Republic, Myanmar, Ukraine and Yemen. The Special Rapporteur is of the view that a positive contribution to the prevention and peaceful resolution of conflicts involving minorities can be achieved through more targeted and collaborative approaches that address the issue of discrimination in areas such as education, political participation, access to employment and public services. This thematic priority would also help to identify the means by which the Special Rapporteur can more effectively contribute to early warning efforts in situations involving systemic exclusion of and discrimination and violence against certain minorities; communicate with United Nations field presences and the peace and security bodies in New York; and improve follow-up to communications sent to States.

C. Tackling hate speech, xenophobic rhetoric and incitement to hatred against minorities

44. In her 2017 report to the Human Rights Council, the previous Special Rapporteur noted that hate speech, xenophobic rhetoric and incitement to hatred against minorities were increasing, coupled with the rise of far-right and extremist political parties worldwide. She believed that it was crucial to appoint a high-level official on minority issues within the Secretariat and to establish senior positions within United Nations departments and agencies dedicated solely to issues of minority rights protection, diversity management and safeguarding pluralistic societies.[12]

45. The Special Rapporteur shares the view of his predecessor as well as the growing concerns of international organizations and civil society groups that have noted in recent years a dramatic rise in the persecution of minorities, with a commensurate number of people of minority backgrounds fleeing their homes, and a dramatic increase in hate crimes against minorities. In that respect, he will continue to build upon previous reports and recommendations, such as those contained in the 2015 thematic discussion on hate speech and incitement to hatred against minorities in the media.[13] He will address those phenomena in consultation with other stakeholders, including regional organizations such as the OSCE High Commissioner on National Minorities, United Nations entities and civil society organizations. Regional initiatives and more action-oriented guidelines are some of the initiatives that the Special Rapporteur will be exploring with various stakeholders on this theme.

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[9] A/65/287.

[10] See A/C.3/47/SR.47, para. 89.

[11] See A/65/287, para. 7.

[12] See A/HRC/34/53, para. 80.

[13] A/HRC/28/64.

D. Education as a human right and its contours and impact for minorities

46. Despite the importance of education as a fundamental human right that is critical to the preservation of the identity of minorities, education has never been addressed in a thematic report by this mandate.[14] Some United Nations and other agencies have addressed education from different perspectives, including in relation to language rights[15] and racial discrimination.[16]

47. Issues surrounding access to quality education without discrimination remain key challenges for many minorities and States worldwide. The Special Rapporteur considers this a main thematic priority of his mandate. He is of the view that education is not only a key component for the protection of the identity of minorities, but it is central to their effective and full inclusion in society. The existence of minorities should no longer be merely tolerated or accepted.

48. In executing the mandate and building upon the knowledge and experience of international organizations, civil society groups and other stakeholders, the Special Rapporteur hopes to further promote the implementation of the Declaration on the Rights of Minorities by clarifying the nature and extent of the human rights of minorities in the area of education, particularly as they relate to the use of a minority language as the medium of instruction. That issue figures prominently in many contexts.

V. Communications sent to governments in 2017

49. A total of 45 communications have been sent to governments since January 2017. Of those, 41 were sent jointly with other special procedure mandate holders. Of the joint communications, 20 were urgent appeals, 21 were letters of allegation. Three joint letters were also sent expressing legislation and policy concerns. One individual letter was sent during the reporting period.

50. The largest number of communications (seven) were sent to States in the Asia-Pacific region, followed by Europe and Central Asia and the Middle East and North Africa, to which five communications were sent respectively. Four communications were sent to States in the Africa region.

51. The largest number of communications (14) dealt with cases pertaining to ethnic minorities, 13 communications concerned religious minorities, 7 communications concerned religious and ethnic minorities, while 3 communications addressed linguistic minorities.

VI. Research on the second cycle of the universal periodic review process

52. Towards the end of 2016, the previous mandate holder conducted a study on the second cycle of the universal periodic review to analyse all minority-related recommendations.[17] The main findings were summarized in her final report of 24 July 2017

[14] The former Working Group on Minorities, established in 1995 and replaced by the Forum on Minority Issues in 2007, did, however, carry out work on topics such as multicultural and intercultural education.

[15] See *Language Rights of Linguistic Minorities: A Practical Guide for Implementation* (2017). Available at www.ohchr.org/Documents/Issues/Minorities/SR/LanguageRightsLinguisticMinorities_EN.pdf.

[16] See Guidance note of the Secretary-General on racial discrimination and the protection of minorities (2013), recommendation 18.

[17] The research was conducted by the members of the Human Rights Project at the Fletcher School of Law and Diplomacy, with assistance from the team at UPR Info.

to the General Assembly[18] and were based on the statistics and database of UPR Info.[19] In the report, she noted that the recommendations made at the twenty-sixth session of the Working Group on the Universal Periodic Review had not been included in the overall electronic database. All the statistics and data gathered in the last round of research therefore reflected the outcomes of the thirteenth to twenty-fifth sessions.

53. The final report on minority issues in the second cycle of the universal periodic review will eventually be posted on the Special Rapporteur's web page. The report on the first cycle of the review is already available.[20]

VII. Language rights of linguistic minorities: a practical guide for implementation

54. In March 2017, the previous Special Rapporteur launched *Language Rights of Linguistic Minorities: A Practical Guide for Implementation*. Available in the six official languages of the United Nations, the guide is intended to serve as a practical tool to clarify the rights of linguistic minorities with regard to language use and preferences. It provides a framework for understanding and implementing a human rights approach to language in such a way that States can more effectively comply with their international obligations.

55. The Guide sets out how language rights emanate from specific human rights involving international human rights treaties and standards. Those rights are enshrined in the provisions of international human rights law, including the prohibition of discrimination, the right to freedom of expression, the right to a private life, the right to education and the right of linguistic minorities to use their own language with others in their group. Those rights have also been further developed in a variety of guiding documents and international standards, such as the Declaration on the Rights of Minorities, the United Nations Educational, Scientific and Cultural Organization (UNESCO) Three Principles on Language and Education, the recommendations of the Forum on Minority Issues on implementing the Declaration on the Rights of Minorities, the Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities Thematic Commentary No. 3 on the language rights of persons belonging to national minorities under the Framework Convention, OSCE Oslo Recommendations regarding the linguistic rights of national minorities and the Hague Recommendations regarding the education rights of national minorities. Those documents describe similar basic approaches to enable State authorities to meet their human rights obligations relating to language, including the following:

(a) Respecting the integral place of language rights as human rights;

(b) Recognizing and promoting tolerance, cultural and linguistic diversity and mutual respect, understanding and cooperation among all segments of society;

(c) Putting in place legislation and policies that address linguistic rights and prescribe a clear framework for their implementation;

(d) Implementing their human rights obligations by generally following the proportionality principle in the use of or support for different languages by State authorities, and the principle of linguistic freedom for private parties;

(e) Integrating the concept of "active offer" as an integral part of public services to acknowledge a State's obligation to respect and provide for language rights, so that those using minority languages do not have to specifically request such services but can easily access them when the need arises;

(f) Putting in place effective complaint mechanisms before judicial, administrative and executive bodies to address and redress linguistic rights issues.

[18] See A/72/165, paras. 89–96.

[19] See www.upr-info.org.

[20] See www.ohchr.org/EN/Issues/Minorities/SRMinorities/Pages/UPRProcess.aspx.

56. The Guide highlights that language rights issues may arise in any activity involving State authorities and language preferences and that they are closely associated with national, collective and individual identity. Language rights can also have an impact on the participation and inclusion of minorities if they are not properly addressed in a balanced, reasonable way, which in turn can lead to sentiments of alienation or marginalization and potentially instability or conflict.

57. The Guide will enable State authorities, civil society actors and United Nations staff to better understand the key conceptual issues and fundamental principles for the promotion and protection of the language rights of minorities within a human rights framework. It also provides specific guidance in key areas such as education, political participation, employment and the media, and includes useful examples of good practices in these areas. The Guide points out that, while minority (and indigenous) women are among the most marginalized individuals in the world, research shows that they perform particularly well in a number of situations when they are taught in their own language, which increases the likelihood of them pursuing further studies or breaking out of the cycle of isolation and poverty. This was particularly notable in relation to communication by minority women with public services in vital areas, such as health care, which often improved with effective use of their own language.

58. This invaluable source material has the potential to improve the opportunities available to minorities for recognizing and strengthening efforts to protect and promote the language rights of minorities. The Special Rapporteur looks forward to it being circulated and operationalized in different regional and national contexts, and will be working closely during the mandate with other interested parties in that regard.

VIII. Update on the 2017 Forum on Minority Issues

59. The Forum on Minority Issues was established in 2007 by the Human Rights Council in resolution 6/15 and reaffirmed in 2012 by resolution 19/23. It is mandated to provide a platform for promoting dialogue and cooperation on issues pertaining to national or ethnic, religious and linguistic minorities, as well as to provide thematic contributions and expertise to the work of the Special Rapporteur on minority issues. The Special Rapporteur is tasked with guiding the work of the Forum, preparing its annual meetings and reporting to the Human Rights Council on its thematic recommendations. The Forum meets annually in Geneva for two working days allocated to thematic discussions. It brings together an average of 500 participants, including minorities, member States, United Nations mechanisms, regional intergovernmental bodies and NGOs.

60. The tenth session of the Forum was held on 30 November and 1 December 2017, with the topic "Minority youth: towards diverse and inclusive societies".

61. Tarik Kurdi, former senior UNHCR official from the Sudan, was appointed as Chair of the tenth session by the President of the Human Rights Council. Many young men and women from minority communities participated for the first time in the forum, while a number of young delegates represented their governments. A total of 12 young minority activists from different parts of the world presented the four main panel discussions on education, participation in public life, digital media, and peace and stability. The Forum was opened on Thursday 30 November 2017 by the Vice-President of the Human Rights Council, Valentin Zellweger, followed by a statement by the Special Rapporteur and remarks by the Chair. Keynote addresses were delivered by OSCE High Commissioner on National Minorities, Lamberto Zannier, and by the Special Advisor to the Secretary-General's Envoy on Youth, Saskia Schellekens. On Friday 1 December 2017, the High Commissioner for Human Rights addressed the Forum.

62. In an effort to improve dialogue among stakeholders and better focus the exchanges on the topic, the session was comprised of four panel discussions, each introduced by three young minority activists. Four moderators guided the discussions, which helped to keep floor interventions more focused on the topic at hand and to maintain a high level of engagement by participants throughout the two-day programme

63. During the first panel discussion, participants discussed and formulated recommendations with regard to access to education, accommodation of minority culture and language in education programmes and facilities, the role of informal education in increasing the awareness of youth with regard to religious, cultural and linguistic diversity. During the second panel discussion, participants raised the issue of political engagement of minority youth, discussed the importance of the representation of minority youth in public institutions and reflected on how to increase positive visibility of young minorities in society. During the panel discussion on youth and digital media, participants called for greater efforts to ensure access to digital media for all — including marginalized minority communities — shared initiatives on how to respond to hate speech and bullying on the Internet and discussed the role of minority-led media initiatives to empower young minority people and to change the mainstream narrative regarding possible bias or stereotype affecting minorities. During the last panel discussion, participants considered the role of minority youth as agents of change for peace and stability and put forward recommendations regarding the need for greater consultation and participation of minority youth in conflict prevention and peacebuilding efforts.

64. Although the Forum achieved a number of its objectives, a number of challenges remain. Among those are the need to consolidate the Forum as a space for interactive dialogue; the need to increase ownership of the Forum agenda by minorities and the need to increase the engagement of States, United Nations bodies, regional organizations and other stakeholders. From a procedural viewpoint, the large number of participants meant that some were unable to take the floor under the desired agenda item and to delve into specific thematic issues or concerns. The Special Rapporteur informed the participants that he wished to conduct a review to see how the organization of future sessions could be improved. He raised the possibility of a more regional approach in order to make this interactive dialogue more accessible to minorities in different parts of the world and more receptive to regional concerns and contexts.

65. Comments and suggestions received from participants and other stakeholders, observations by previous mandate holders, an internal analysis by the Secretariat and external studies, such as the study on global governance for minority rights, prepared jointly by the Tom Lantos Institute and the University of London School of Advanced Studies, will also help to initiate the reflection to improve the Forum.

66. The research conducted by the Tom Lantos Institute and the University of London School of Advanced Studies in particular provides useful insights and suggestions for the Special Rapporteur's review of the operations, objectives and challenges of the Forum on Minority Issues. It identified many areas for further attention, including:

(a) Forum recommendations: Suggestions for improvement include a longer lead time to comment on recommendations online; drafting of recommendations that are more closely based on Forum discussions; improved efforts to disseminate Forum recommendations;

(b) Forum themes: Suggestions put forward include a more open process, whereby participants can submit suggestions for the thematic focus and early theme selection to enable enhanced participation;

(c) Agenda structure: Changes could be considered in relation to speaking time and structure and a more open-ended agenda so that participants could speak on issues of concern in relation to protection of minority rights;

(d) Side events: They provide a more intimate space to dialogue on pressing issues, but not necessarily an opportunity to have expert input into country situations; facilitate dialogue between State representatives and civil society participants; organize special side events on key "crisis" issues where the Special Rapporteur could bring together representatives of States, NGOs and other stakeholders to host focused, round-table discussions on key areas of concern;

(e) Forum follow-up: The potential of the United Nations Network on Racial Discrimination and Protection of Minorities could be explored further to help with follow-up to Forum recommendations. Given the unique character of the Forum in the United

Nations system as a "marriage" between a special procedure and a United Nations' entity, this could be operationalized more strategically by, for instance, linking country visits to key Forum themes, or convening meetings on the implementation of relevant thematic recommendations during country missions;

(f) Documentation: A searchable database containing all Forum statements would help to consolidate all the information generated by the Forum and make it more accessible; efforts to enhance the submission of written documents needs to be considered.

67. The Special Rapporteur wishes to reiterate the crucial importance of the Forum on Minority Issues, which represents the only avenue for a number of minority rights activists to advocate for change at the international level, but also as a positive and unique platform for promoting dialogue and cooperation on issues pertaining to national or ethnic, religious and linguistic minorities. He hopes that more States will attach increased importance to this unique platform and he encourages them to demonstrate their commitment to minority rights by contributing to the funding of the Forum so as to ensure its sustainability and progress.

68. The Special Rapporteur also welcomed the participation for the first time in the Forum of members of the World Federation of the Deaf. He acknowledges the importance of recognizing that, as users of sign language and members of a linguistic minority, deaf people everywhere have human rights that would, in the future, be considered in the activities of the mandate.

IX. Conclusions

69. **Individuals belonging to linguistic, religious or ethnic minorities are among the most vulnerable and marginalized in the world. Efforts need to be intensified in order to protect minorities who are disproportionately affected by statelessness and denial of citizenship and, in some cases, victims of systematic and widespread discrimination, exclusion and targeted by ethnic cleansing or even genocide. Minority women in particular may find themselves doubly marginalized because of their gender and as members of a linguistic, religious or ethnic minority.**

70. **Mandated by the Human Rights Council to promote the implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and to examine ways and means of overcoming obstacles to the full and effective realization of the rights of minorities, the Special Rapporteur will adopt a global approach to issues through constructive exchanges and collaboration with all relevant stakeholders, including States, United Nations human rights mechanisms, international and regional organizations and civil society.**

71. **The Special Rapporteur will also build on the groundbreaking work carried out by his predecessors on the importance of addressing discrimination, exclusion and other violations of human rights affecting various communities, including the Dalit and Burakumin minorities, and other particularly vulnerable minorities such as the Roma and members of deaf minorities amongst others. He will do so by extending the practice of holding consultations with members of these communities.**

72. **Substantively, the Special Rapporteur will address four thematic priorities, namely, statelessness and the denial of the rights of minorities in citizenship matters and situations of statelessness; the interrelationship between conflict, minority rights and the promotion of inclusiveness and stability, which are central to the implementation of the Declaration on the Rights of Minorities; the critical challenges of tackling hate speech, xenophobic rhetoric and incitement to hatred against minorities; and the sometimes misunderstood human rights dimensions of education and the rights of minorities, including in connection with the issue of the use of a minority language as the medium of instruction.**

73. ***Language Rights of Linguistic Minorities: A Practical Guide for Implementation*, which was launched in March 2017 in all six United Nations languages, is a potentially**

useful tool that showcases good practices in a number of States in relation to the rights of linguistic minorities on language use and preferences, especially in education.

74. **The lack of clarity or recurrent misunderstandings with regard to a number of fundamental issues surrounding the rights of minorities creates, in some cases, ambiguities and uncertainties that can impact negatively on the implementation of the Declaration on the Rights of Minorities. To more effectively implement his mandate, the Special Rapporteur will endeavour to clarify the concept of minorities using different approaches and analyses.**

75. **The Special Rapporteur will explore ways to effectively renew State commitments in the light of the twenty-fifth anniversary of the Declaration on the Rights of Minorities and improve the reach and impact of the Forum on Minorities Issues, especially as it celebrates its tenth anniversary.**

76. **The Forum on Minority Issues remains a unique United Nations platform for promoting dialogue and cooperation on issues pertaining to national or linguistic, religious and ethnic minorities and providing thematic contributions and expertise to the mandate on minority issues. The Special Rapporteur hopes that more States will attach increased importance to this unique platform. He encourages States to demonstrate their commitment to the rights of minorities by contributing to the funding of the Forum so as to ensure its sustainability and progress. The Special Rapporteur will continue to provide guidance for the work of the Forum with a view to strengthening its role and its responsiveness to current and future global issues affecting minorities.**

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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*

Chair-Rapporteur: Guillaume **Long**

* The annexes to the present report are circulated as received, in the language of submission only.

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I. Introduction

1. The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights was established by the Human Rights Council in its resolution 26/9 of 26 June 2014, and mandated to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises with respect to human rights. In the resolution, the Council decided that the Chairperson-Rapporteur should prepare elements for the draft legally binding instrument for substantive negotiations at the commencement of the third session of the working group, taking into consideration the discussions held at its first two sessions.[1]

2. The third session, which took place from 23 to 27 October 2017, opened with a video statement by the United Nations High Commissioner for Human Rights. He congratulated the former Chair-Rapporteur for successfully steering the first two sessions in a manner that laid fertile ground for the preparation of the elements and recognized that the treaty process had entered a new phase to discuss such elements. He noted that the Guiding Principles on Business and Human Rights were an important step towards extending the human rights framework to corporate actors. He stated that there was no inherent dichotomy between promoting the Guiding Principles and drafting new standards at the national, regional or international level aimed at protecting rights and enhancing accountability and remedy for victims of corporate-related human rights abuses. He reiterated his commitment and full support to the working group, and expressed his hope that the recommendations from the accountability and remedy project of the Office of the United Nations High Commissioner for Human Rights (OHCHR) could provide useful contributions to the discussion during the third session.

3. The High Commissioner's remarks were followed by a statement of the President of the Human Rights Council, who emphasized the role that human rights must have in relation to business in a globalized world. He noted that seeking consensus and engaging in constructive cooperation and dialogue was the spirit of the first two sessions and would be key to fulfilling the mandate provided by resolution 26/9. The President further recalled the close link between the 2030 Agenda for Sustainable Development and the development of human rights, which justified its use as a starting point to form the objectives of the working group process.

4. The Director of the Thematic Engagement, Special Procedures and Right to Development Division referred to the recommendations of the accountability and remedy project, aimed at enhancing the effectiveness of national judicial systems in ensuring accountability and access to remedy, including in cross-border cases, which could inform the working group process. She expressed the willingness of OHCHR to provide further substantial or technical advice to the working group as appropriate.

II. Organization of the session

A. Election of the Chair-Rapporteur

5. The working group elected Permanent Representative of Ecuador, Guillaume Long, as Chair-Rapporteur by acclamation following his nomination by the delegation of Jamaica on behalf of the Group of Latin American and Caribbean States.

[1] See A/HRC/31/50 and A/HRC/34/47.

B. Attendance

6. The list of participants and the list of panellists and moderators are contained in annexes I and II, respectively.

C. Documentation

7. The working group had before it the following documents:

(a) Human Rights Council resolution 26/9;

(b) The provisional agenda of the working group (A/HRC/WG.16/3/1);

(c) Other documents, notably a document setting out the elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights (hereinafter, "the elements document"), a programme of work, and contributions from States and other relevant stakeholders, which were made available to the working group through its website.[2]

D. Adoption of the agenda and programme of work

8. In his opening statement, the Chair-Rapporteur explained how the third session would involve substantive negotiations based on the elements document that was distributed in advance of the session. The elements set out in the document were based on deliberations during the first two sessions, as well as over 200 meetings held since 2014 involving multiple stakeholders. At the core of the elements was the protection of victims of business-related human rights abuse, the elimination of impunity and access to justice. He invited everyone to participate actively, including civil society, trade unions, national human rights institutions and victims organizations, as their role was crucial to the success of the process. He emphasized that future generations should have the right to live in a world in which human rights took primacy over capital.

9. The Chair-Rapporteur presented the draft programme of work and invited comments. A regional organization expressed its regret that consultations on the draft programme of work had not occurred until 18 October, providing little time for negotiations on such an important document. The delegation recalled that, despite the short notice, all attendees had worked hard to find a compromise and praised the Permanent Mission of Ecuador to the United Nations Office and other international organizations in Geneva. According to the regional organization, a compromise had been tentatively reached on 18 October, whereby there would be two additional elements included in the programme of work. First, a debate reflecting on the implementation of the Guiding Principles would be included at the start of the session. Second, a footnote that was included in the programme of work of the second session would be reproduced, stating "this programme of work does not limit the discussions of this intergovernmental working group, which can include transnational corporations, as well as all other business enterprises". While the delegation acknowledged that the first element of the compromise was mostly incorporated (albeit without panellists to lead the discussion), it was concerned that the footnote had been excluded. It stressed that that was not a procedural issue, but a substantive one with wide implications, as the inclusion of the footnote would ensure that the working group could also consider abuses involving activities related to national enterprises. Therefore, it requested an amendment to the programme of work to include the footnote.

[2] See www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx.

10. Several delegations intervened to express their support for the programme of work as proposed by the Chair-Rapporteur and requested the flexibility of the regional organization to adopt it to start negotiations. Some other delegations supported the proposal of the regional organization and regretted the lack of consensus with regard to the programme of work.

11. The delegations that rejected the proposal stressed that the mandate in resolution 26/9 — limited to transnational corporations — was clear and that there was no need to advance substance or prejudge content to be discussed and negotiated. They considered that that would improperly attempt to amend a Council resolution. Other delegations saw the merit of including the footnote to broaden the scope of the discussions, in line with the programme of work adopted for the second session.

12. Another delegation did not agree that any compromise was reached at the 18 October meeting since many delegations had not been present and recalled that it was not just one State against the proposal to include a footnote in the programme of work. Additionally, that delegation found it peculiar that the same delegations voting against resolution 26/9 were now calling for an expansion of the mandate with the intention of blocking the session. Another delegation noted that the discussion was unreasonably delaying negotiations and was ultimately harming those they were trying to protect through that process.

13. The regional organization recalled that resolution 26/9, which they respected, restricted the scope and, therefore, prejudged the outcome of the negotiations and that the programme of work was a working modality to allow for an inclusive process. It found it puzzling that one could object to its proposal, as it sent a message to civil society, human rights defenders and victims that abuses by national enterprises should not be treated with equal rigor. Additionally, the delegation reaffirmed that that was a compromise proposal that nobody objected to during the consultations except for one State and that the footnote was part of the programme of work for the second session. It stated that that unfortunate situation raised serious questions as to whether any agreement on basic principles, let alone language, could be forged in the future.

14. The Chair-Rapporteur shared the view that a compromise had not been reached to amend the programme of work and pointed out that further discussion could take place during the panel devoted to the scope of the treaty. He suggested that the working group adopt the programme of work as presented and that all delegations' views be reflected in the report. As no delegation expressed objections to that proposal, the programme of work was adopted.

III. Opening statements

A. Keynote speeches

15. María Fernanda Espinosa Garcés, Minister of Foreign Affairs of Ecuador, and former Chair-Rapporteur of the working group, delivered a keynote statement that explained the background to the establishment of the working group. Discussions surrounding the regulation of transnational corporations at the international level dated back to the 1970s. Since then, globalization had brought great power to transnational corporations, leading to positive consequences for economic development, but also many negative social consequences. Non-binding, voluntary rules had been valuable but had been unable to ensure victims' access to remedy in cases of corporate human rights violations. The adoption of resolution 26/9 was a milestone, representing a paradigm shift in the efforts to address corporate abuse. The working group process, led by Ecuador and South Africa, to fill a gap in international law was supported by a wide range of stakeholders,

including a large number of civil society organizations. Serious companies supported it since they wanted a level playing field. She stressed the importance of prevention in the elements document, which could have been a key tool to avoid disasters like Rana Plaza, pollution in the Niger Delta and the destruction of lives in the Amazon by Chevron-Texaco. States supported it since they recognized that the two paths — one obligatory, the other voluntary — were mutually reinforcing, as demonstrated by the recent French duty of vigilance law and several other examples. Ms. Espinosa expressed her appreciation that hundreds of people had signed up to participate in the process and hoped that everyone would engage constructively and with respect for diverse viewpoints.

16. Dominique Potier, Member of the French National Assembly, highlighted the importance of ethics in guiding any discussion on human rights. Historically, attempts to fight slavery and provide labour protection were challenged as regulations leading to "the end of the world", but ended up being the dawn of a new era. Such efforts led to significant decreases in abuse. The recent French duty of vigilance law was a contemporary regulation that could serve as an inspiration for the working group. The law was based on United Nations principles, including the Guiding Principles; was process-oriented; focused on nationality rather than territory; and was progressive in that it targeted the largest companies so they could lead by example. That pragmatic approach made the French law acceptable for all, relevant and adequate to tackle human rights violations. It created a national framework that had an impact all over the world.

B. General statements

17. Delegations congratulated the Chair-Rapporteur on his election and thanked the former Chair-Rapporteur for successfully leading the first two sessions. Many delegations expressed appreciation for what they considered a transparent and inclusive process and reaffirmed their trust in the Chair delegation in overseeing the third session.

18. A delegation speaking on behalf of a regional group of countries reiterated its commitment to resolution 26/9 and stressed that transnational corporations could not operate in a legal void. According to that group, setting clear standards would provide a level playing field and predictability. For the group, the work undertaken during the sessions was complementary to the work on private military and security companies, environmentally sound management of hazardous wastes and illicit flows. Therefore, they stressed the need to regulate the operations of transnational corporations and other business enterprises in a uniform manner.

19. Many delegations voiced their support for establishing a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. While recognizing that business could and did have a positive impact on human rights, especially with respect to economic development, several delegations, including a regional group, and non-governmental organizations (NGOs) stated that companies had undermined human rights and contributed to adverse human rights impacts with impunity. Efforts to address that accountability gap had been ongoing for over 40 years with little success.

20. Delegations recognized that initiatives such as the Guiding Principles had been a large step forward, but found that soft law instruments and voluntary principles had not been enough; a mandatory regulatory framework was needed to ensure accountability and access to justice. Creating a legally binding instrument would be complementary to, and not in opposition to, the Guiding Principles. Legal lacunae in the Guiding Principles could be addressed with international obligations, and certain aspects of the Guiding Principles should be made mandatory.

21. A legally binding instrument would benefit victims of business-related human rights abuse by ensuring that companies were held accountable and that victims had access to prompt, effective and adequate remedies. Additionally, several delegations considered that such an instrument could be beneficial to business since it would create a level playing field. Uniform rules across jurisdictions would create legal certainty that business would appreciate.

22. Many delegations welcomed the elements document as being comprehensive, imposing obligations on transnational corporations and other business enterprises and contributing to victims' access to justice.

23. One regional organization noted that the Chair-Rapporteur had opted for an all-encompassing business and human rights negotiation, which, to their understanding, risked delaying progress. The delegation reserved their position on the document.

24. Several other delegations, as well as some business organizations, voiced concern about the elements document and regretted that it had been published three weeks before the session, allowing insufficient time to fully analyse and formulate official positions on the content.

25. One regional organization highlighted that the Guiding Principles recalled the existing obligations of States and that full implementation would probably react to the numerous cases documented by civil society and human rights defenders.

26. Some delegations thought that discussions on a legally binding instrument were premature. The Guiding Principles had been unanimously endorsed six years ago, and more time was needed to implement them. That process risked distracting attention away from such implementation. Other delegations agreed that primacy should be afforded to the Guiding Principles, but acknowledged that both the Guiding Principles and a legally binding instrument would have common objectives, and that a smart mix of voluntary and regulatory measures could be beneficial.

27. Many delegations agreed that States had the primary duty in protecting against human rights abuses by third parties, including business enterprises, and commended the elements document for reflecting that consensus. However, there was disagreement as to which business enterprises should be covered by a legally binding instrument. Several delegations expressed the view that national enterprises should be covered by the instrument, a view shared by many NGOs. Given the complex nature of corporate structures and the prevalence of nationally incorporated subsidiaries, those delegations feared that transnational corporations could find ways to fall outside the scope of an instrument regulating only transnational activities. While some delegations expressed the view that resolution 26/9 and the proposed elements permitted all business enterprises to be covered, other delegations rejected that as expanding the mandate in resolution 26/9 and noted that national laws already regulated national companies.

28. Delegations disagreed about the extent to which an instrument should permit the exercise of extraterritorial jurisdiction. One delegation suggested that the instrument could incorporate extraterritorial obligations as laid out in the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, while another delegation rejected the idea that a legally binding instrument should permit States to exercise any form of extraterritorial jurisdiction.

29. Multiple delegations welcomed the fact that the elements document included provisions on international cooperation and capacity-building. The legally binding instrument should recognize the differing capacities of States and allow for assistance in order to ensure effective implementation of the treaty.

30. Some delegations and multiple NGOs insisted that the treaty ensure specific protections for certain vulnerable populations, such as indigenous peoples. Given the

disproportionate effect that human rights abuses had on women and girls, there was a call for a gendered approach to the treaty.

31. Some delegations and NGOs also discussed the need for the instrument to take account of conflict situations and provide special protection in cases of occupation and other types of armed conflict.

32. While several NGOs called for the instrument to clearly assert the primacy of human rights over trade and investment agreements, one delegation highlighted that there was no hierarchy among norms in international law, with the exception of *jus cogens* norms.

33. There was wide consensus among most delegations and civil society that, going forward, the process would benefit from a transparent, inclusive, and constructive dialogue involving multiple stakeholders. Some delegations and business organizations expressed concern that the business community had not been given sufficient opportunities to engage meaningfully in the current session.

C. Debate: reflections on the implementation of the Guiding Principles on Business and Human Rights and other relevant international, regional and national frameworks

34. One regional organization expressed its appreciation for including the current session in the programme of work. It recalled how in the last six years, there had been numerous positive initiatives aimed at implementing the Guiding Principles. Since the working group process could be expected to take some time to conclude, it was suggested that States and business should take further steps to implement the Guiding Principles at the time in order to prevent abuses and ensure protection for victims.

35. A number of delegations expressed their support for the Guiding Principles, as a unanimously endorsed authoritative global standard. Additionally, delegations discussed different initiatives implementing the Guiding Principles, in particular national action plans. Support was expressed for the accountability and remedy project, the Working Group on business and human rights, as well as the annual Forum on Business and Human Rights.

36. Some delegations noted that the Guiding Principles were not purely voluntary since they discussed the substantive obligations of States under international human rights law. Other delegations and one NGO did not agree that the Guiding Principles could guarantee the protection of human rights.

IV. Panel discussions

A. Panel I. General framework

37. The first panellist noted that the counterweight to the impunity of the transnational corporations was the product of a strong grass-roots process. Consumers needed access to information to influence business habits; thus, there should be transparent human rights due diligence processes throughout supply chains. She noted that the European Parliament had mandated its representative to maintain a constructive dialogue with the working group because it believed that there needed to be a legally binding instrument regulating business and human rights. The panellist invited the regional organization to engage constructively in accordance with the common position of the European Parliament with respect to that process.

38. The second panellist offered a development perspective to the discussion. He argued that globalization distinctly disadvantaged developing countries, and that large financial

corporations posed barriers to development in the global South and affected inequality within all nations. Furthermore, the predatory features of the current economy impeded the Sustainable Development Goals, but there was a growing trend to combat that.

39. The third panellist addressed the accelerating pace of challenges faced by the global community with respect to development and recognition of human rights. He found the proposed elements reflected the main perspectives expressed during the previous two sessions and highlighted three objectives in the document: (a) guaranteeing the respect, promotion and fulfilment of human rights, (b) guaranteeing access to remedies, and (c) strengthening international cooperation.

40. Some delegations argued that the chapter on the "General framework" in the elements document should be more concise, while others expressed appreciation for the comprehensive approach. To facilitate shortening the chapter, it was proposed merging the subsections on "principles", "purpose", and "objectives". Other delegations thought that only the subsections on "purpose" and "objectives" should be merged and questioned what the difference was between the two given the similar elements in both categories.

41. With respect to the "preamble", several delegations commented on the selection of instruments listed, with some arguing that there were too many instruments and others arguing that certain instruments were missing. One regional organization and some NGOs questioned why treaties were contained in the same list as non-binding instruments.

42. Some delegations suggested that there should be reference to the positive impact business could have on human rights, while other delegations suggested including a reference to the negative effects of transnational corporations in the context of globalization. Additionally, NGOs recommended that language should be included regarding corporate capture.

43. Several delegations appreciated the references made to the right to development and economic, social and cultural rights. Additionally, delegations and NGOs welcomed the reaffirmation of the Guiding Principles, showing that that process was complementary. However, one delegation found it inappropriate to include a reference to the Guiding Principles since they had not been developed and negotiated by States. One business organization questioned why there was a reference to the norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, when that process was abandoned over a decade ago. The Chair-Rapporteur replied that many elements contained in those norms were cited approvingly in the first two sessions.

44. Much discussion focused on the subsection on "principles". Many delegations and NGOs welcomed the recognition of the primacy of human rights obligations over trade and investment agreements. However, one regional organization and other delegations questioned the legal basis for that and wondered how it would apply in law and practice. It was queried whether this would require the renegotiation of existing treaties, and whether that implied that States could disregard provisions of trade and investment treaties, citing human rights. One delegation asked how the primacy of human rights obligations would be considered, taking into account the report on fragmentation of international law of the International Law Commission.

45. Delegations questioned whether recognizing special protection of certain human rights signalled a hierarchy of certain human rights over others. One regional organization noted that that provision could potentially conflict with another provision discussing the universality, indivisibility, interdependence and interrelationship of all human rights. The Chair-Rapporteur clarified that the intention of the provision was not to create a hierarchy, but to note specific rights that were more likely to be affected by business activities.

46. Some delegations voiced concern over the language used to recognize the special protection of vulnerable groups. Acknowledging that certain groups required differentiated

treatment, it was feared that including a list of some groups could indicate the exclusion of others. Others requested that the language be altered to reflect a more positive, empowering tone.

47. One delegation noted that the reference to the duty of States to prepare human rights impact assessments was inappropriate in that section since that was not a "principle". The same delegation also expressed concern about the provision recognizing the responsibility of States for private acts since it believed it had been worded too generally and failed to recognize that such responsibility only arose in certain circumstances.

48. Several elements under the subsection on "purpose" also received attention. Some delegations approved a reference to the civil, administrative and criminal liability of business. One delegation did not agree since many States' legal systems did not criminally punish legal entities, and thought that States should have discretion as to how to enforce the treaty.

49. Delegations and NGOs welcomed the reaffirmation that States' human rights obligations extended beyond territorial borders, with some requesting that that be elaborated in the instrument. One regional organization questioned whether that provision conflicted with one in the preamble reaffirming the sovereign equality and territorial integrity of States, including in relation to progress in the area of the responsibility to protect. A business organization expressed concern about the inclusion of the term "promotion", saying that, while companies should respect human rights, they should not have an international obligation to "promote" human rights.

50. Regarding the objectives of the instrument, delegations welcomed the reference to international cooperation and mutual legal assistance, noting its importance for the effective implementation of the instrument.

B. Panel II. Scope of application

51. The first panellist noted that the elements document referred to the transnational activities of transnational corporations and other business enterprises, regardless of the mode of creation, control, ownership, size or structure. That indicated an inclusive approach in line with the Guiding Principles and rightly focused on activities rather than their corporate ownership. Additionally, she supported the scope of application to cover all internationally recognized human rights.

52. The second panellist also expressed support for extending the scope of application to all internationally recognized human rights, reflecting their universality, indivisibility and interdependence. The panellist questioned restricting the elements to acts of a transnational character since, from the victim's perspective, it was irrelevant whether an act was national or transnational. Additionally, she suggested that the instrument apply to regional organizations beyond economic integration organizations.

53. The third panellist emphasized that the working group was acting under a Council mandate; thus, human rights must prevail, not investment and trade, and urged more focus on human rights defenders. The panellist noted that a legally binding instrument should address gaps in voluntary initiatives and explore direct obligations on business.

54. With respect to the rights covered by a binding instrument, most delegations agreed that all internationally recognized human rights should be included. Some delegations mentioned specific rights, such as the right to development, the right to property and the right to permanent sovereignty over natural resources. It was suggested that the instrument should also ensure protection of nationally recognized rights. Another delegation suggested that the wording of that provision in the elements document was overbroad by including

"other intergovernmental instruments" beyond human rights treaties, since those instruments were neither binding nor universal.

55. Other delegations disagreed that all human rights should be included due to the lack of universality of many human rights.

56. Regarding the provision covering acts subjected to the instrument's application, some delegations and NGOs were concerned that its scope was unclear and suggested that the phrase "business activity that has a transnational character" be defined to ensure effectiveness of the instrument. It was noted that if liability was involved, defining the phrase was mandatory. While a delegation and panellist disagreed, it was suggested that guidance could be drawn from international instruments covering transnational crime, without borrowing definitions.

57. A regional organization indicated that, in addition to the lack of definition, there were several questions as to whether that provision was aimed at the establishment of causation, a contribution to an abuse or a linkage. They also noted the unclear language, such as "indirectly controlled".

58. A regional organization raised questions relating to the acts to be covered by a future instrument, including whether the provision discriminated between foreign and national companies if national companies were categorically excluded from the scope. In response, a panellist disagreed that that would constitute discrimination since the provision focused on conduct, not nationality. Another delegation recalled that when it came to national enterprises, they were covered by national legislation, but the same did not apply to transnational corporations, justifying the need to address such corporations. The main issue regarded human rights abuses resulting from transnational corporate activity, access to justice for victims and proper reparation. That was meant to protect human rights, and drawing a distinction was not discrimination as it was clearly recognized in several countries. According to that delegation, challenges existed in all type of companies, but the growing size of value chains had resulted in the failure to respect human rights and a lack of accountability. Therefore, a more effective reference could be linked to corporate activity rather than to the company itself.

59. Concerning which actors should be subject to the instrument, some argued that only States would be the proper subjects. Another delegation was open to the provision covering organizations of regional economic integration but questioned why those were not mentioned elsewhere in the document. Furthermore, there was concern that those organizations would be difficult to regulate in practice given the relationship between individual States and such institutions.

60. Several delegations considered that transnational corporations and other business enterprises should be subject to the instrument but not national companies. One delegation suggested that the focus should be on business activity in general, regardless of its transnational nature. Other delegations noted that such companies were subject to national laws and need not be included; in that regard, they emphasized that negotiations must go on guided by the mandate of resolution 26/9. One regional organization pointed out that the national laws of the countries they operated in regulated transnational corporations. It was highlighted that national enterprises should be included as they could also be responsible for human rights abuses. There was a call for the inclusion of online corporations in the scope of application. Several delegations emphasized that the discussions about the scope should continue within the mandate of resolution 26/9.

61. Some delegations voiced concern over the provision subjecting natural persons to the instrument, noting that was unnecessary since international criminal law covered individuals. Other delegations were of the opinion that individuals should be subject to the instrument. An NGO emphasized the importance of tackling the question of the definition

of transnational corporations, in order to avoid confusion and loopholes that transnational corporations could use to their advantage.

62. Some delegations emphasized the importance of including regulations of business activities in conflict and post-conflict areas as businesses could exploit those situations for natural resources.

C. Panel III. General obligations

63. The first panellist called for the treaty to clarify that States must regulate the extraterritorial actions of companies domiciled within their jurisdiction, for instance by ensuring that companies disclosed information about their transnational operations. With respect to international organizations, the panellist noted that those organizations had a duty to respect human rights and States must ensure that those organizations complied.

64. The second panellist did not support the content of the elements document and voiced concern about imposing international law obligations on companies, as that could lead to States delegating their duties to the private sector, undermining the full protection of human rights. Furthermore, generally imposing such duties was impractical given the number and diversity of the actors involved.

65. The third panellist decided to focus his remarks on gaps in the elements document. With respect to the obligations of States, he regretted that concepts of corporate law, such as separate legal personality, were absent, noting that a successful instrument must address those issues. Furthermore, he suggested that the instrument should clarify what constituted an actionable violation if placing binding obligations on corporations.

66. The fourth panellist emphasized workers' support of the working group and noted that labour rights must be included. She noted that the instrument should oblige companies to exercise due diligence and provide remedies. While acknowledging that some provisions in the elements document were vague, more detail could be developed during the negotiation process.

67. While many delegations supported the proposed elements under "general obligations", some noted the need to continue with negotiations on certain specific provisions, as provisions of a legally binding instrument must be worded clearly if legal consequences would attach.

68. Regarding the provisions on "State obligations", it was noted that many elements seemed to restate existing obligations and their added value was questioned. There was concern that the provisions requiring States to adapt national legislation and impose restrictions on public procurement contracts interfered with the internal affairs of States, as it should be up to each State to determine how to implement its treaty obligations. Additionally, there were calls for more specificity in the provisions regarding reporting and disclosure requirements, as well as the provision requiring States to ensure that human rights be considered in their contractual engagements.

69. Other delegations commended the drafting of the section, specifically voicing support for the recognition that States had the primary duty to protect human rights and take measures to prevent, investigate, punish and redress violations to ensure that companies respected human rights throughout their activities. Some welcomed the provision requiring States to ensure that companies conducted human rights and environmental impact assessments. However, one delegation expressed that it was beyond the working group's mandate to discuss environmental impact assessments.

70. Throughout the discussion, there were several suggestions for additional elements, including a reference to international cooperation and mutual legal assistance, clarification as to extraterritorial obligations, regulation of State-owned companies, mandatory gender

impact assessments by an independent entity, reference to conflict areas and the protection of human rights defenders, as well as gender-specific provisions that took into account the particular needs of women human rights defenders.

71. Concerning the inclusion of a section on "obligations of transnational corporations and other business enterprises", some delegations asked for information on the legal basis for imposing international human rights obligations on companies. Additionally, questions were raised as to how that would work in practice and whether that would be appropriate in the absence of a structure capable of law enforcement. Other delegations found it appropriate to impose international obligations on companies and referenced several treaties establishing obligations on legal entities. In their view, such obligations were necessary to ensure the effectiveness of the instrument.

72. Delegations suggested that additional obligations should be imposed on companies, including to mandate human rights due diligence and reporting; ensure free, prior and informed consent when operations could adversely affect communities; prevent corporate capture; oblige companies to pay taxes in countries they operated in; and positively promote human rights. An NGO highlighted the importance of establishing a general obligation on transnational corporations and other associated actors, such as financial institutions, to disclose the object and volume of their transactions, and to prohibit channelling their operations through tax havens.

73. With respect to the section on obligations of international organizations, it was questioned whether that provision belonged elsewhere since it appeared to concern an obligation of States and not international organizations as such. To the extent that the provision did create obligations for international organizations, some delegations expressed their reservation in making limitations on bodies created by different instruments with different mandates.

D. Panel IV. Preventive measures

74. The first panellist noted an existing accountability gap for victims and argued that the instrument should oblige States to require effective and binding due diligence processes from all companies covering the complete life cycle of a product, including its disposal. He noted that several provisions in the section on preventive measures did not seem directly relevant to prevention and suggested moving them to a more appropriate section.

75. The second panellist argued that preventive measures in the treaty should focus on two components: (a) preventing acts by transnational corporations that adversely affected human rights, and (b) preventing corporate capture. Regarding corporate capture, the panellist proposed that States should ensure transparency and disclosure of documents and contracts with transnational corporations. Additionally, States should prohibit political contributions from transnational corporations and forbid outsourcing of security services to companies.

76. The third panellist recommended ways to strengthen that section, such as by including references to due diligence obligations relating to development institutions, the use of independent impact assessments, the coverage of labour and environmental rights, the inclusion of a gender perspective, the use of ex ante and ex post impact assessments, and the inclusion of the free, prior and informed consent principle.

77. Delegations and NGOs highlighted the importance of prevention and welcomed a dedicated section in the document. It was questioned whether, conceptually speaking, the elements in that section should be linked with the one on obligations as the provisions addressed the obligations of States and companies. Some sought more precision in the wording of the provisions, wanting to know whether the terms "adequate" or "necessary measures" took proper account of differing capacities among States. One business

organization expressed concern that the language used reopened an issue that had been resolved in the Guiding Principles, potentially causing confusion and unintended consequences.

78. Many delegations welcomed the provision whereby States required companies to adopt and implement due diligence policies and processes. It was suggested that that provision should ensure that States implement uniform, minimum standards. A delegation and several NGOs thought risk assessments under that provision should address environmental impacts. Concern was expressed that, since those measures were to apply to all the transnational corporations and other business enterprises in a State's territory or jurisdiction, including subsidiaries and all other related enterprises throughout the supply chain, it would allow States to exercise extraterritorial jurisdiction improperly. The Chair-Rapporteur clarified that the due diligence obligation was meant for the parent company domiciled in a State and that a company was to assess risks throughout its supply chain.

79. Concern was expressed about the provision requiring consultation processes, as one delegation was unsure when that would be required and for what purpose. Other delegations and several NGOs saw value in the provision. Some NGOs suggested that that provision should clearly require the free, prior and informed consent of communities, in particular indigenous communities, when transnational corporation projects threatened adverse human rights impacts.

80. Concerning the provision requiring dissemination of the instrument to everyone in a State's territory in a language they could understand, some delegations stressed the importance of the populace knowing their rights; however, one delegation felt that that provision interfered with States' right to determine how to implement the instrument.

81. Some sought clarification on the provisions requiring periodic reporting, with one NGO indicating that that provision would have no teeth without an enforcement mechanism.

82. Some delegations and NGOs suggested adding language in that section aimed at preventing the capture of public institutions by vested business interests, and drew attention to article 5 (3) of the World Health Organization Framework Convention on Tobacco Control for guidance. Additionally, there was a call for the section to include enhanced due diligence for businesses operating in the context of armed conflict.

E. Panel V. Legal liability

83. The first panellist emphasized that the instrument should cover environmental, health and safety, and workers' rights, as well as corporate complicity in State violations. Given the difficulties with enforcing criminal liability, the focus should be on civil liability for multinational parent companies. Several practical challenges arose in the civil context, such as victims' lack of access to information and legal assistance, and those should be addressed to ensure that victims obtained redress.

84. The second panellist noted the comprehensive nature of the provisions on legal liability and recognized how they could be relevant in a variety of legal systems. The panellist described increasing recognition at the international and regional levels of criminal liability of legal entities. He stressed the necessity of criminal liability to serve as a deterrent, better protect individuals and communities' rights, and provide access to justice for victims.

85. The third panellist appreciated the inclusion of that section, particularly the provision ensuring that civil liability not be made contingent upon a finding of criminal liability. He cautioned against including provisions that mandated specific legal actions, as that could be contrary to certain legal systems and counterproductive to the goals of the

instrument. He further suggested that the provision discussing due diligence procedures should be placed in a different section.

86. Delegations signalled their approval for including a section on legal liability, although some suggested that that section should be clearer and more concise. Some recognized legal liability could also encompass natural persons. Most delegations and NGOs agreed that criminal, civil and administrative liability should attach to legal entities, and some delegations shared national laws that imposed those types of liability on companies. It was noted that the different types of liability were complementary; however, some delegations were concerned at the lack of differentiation among them. In their view, differentiated language was needed to reflect whether a provision referred to criminal, civil or administrative liability. Furthermore, it was noted that some legal systems did not allow for the imposition of criminal liability on legal entities; thus, provisions requiring such liability would be inappropriate. States should have the flexibility to choose how best to incorporate the treaty into national law. Concerns were also raised about the appropriateness of imposing international obligations on legal entities.

87. Some delegations called for greater detail and clear, minimum standards regarding the measures States must take to establish the different forms of legal liability in their jurisdictions. Others appreciated the flexibility provided for in the elements, allowing States to adopt their own legal measures in accordance with their national systems.

88. It was noted that the two provisions dealing with the commission and attempt of criminal offences were unnecessary given the general provision in the section covering civil, criminal and administrative offences. It was also questioned why the term "international applicable human rights instruments" was used in those sections when other sections used different terminology.

89. Clarification was sought as to the meaning of the provision establishing civil liability for companies for participating in the planning, preparation, direction of or benefit from human rights violations caused by other companies, with one delegation suggesting that that should cover indirect benefits as well. Similarly, some delegations called for more precision as to the contours of the provisions dealing with immunities, State responsibility for the actions of companies under their control, and complicity. Regarding the issue of complicity, it was queried whether States would automatically become responsible for any harm committed by a company.

90. One delegation also considered that the provision promoting decent work in supply chains fell outside the scope of the mandate given by resolution 26/9.

91. It was suggested that that language should be added to the section to address parent company liability. Additionally, an NGO suggested that international crimes should be included in the section.

F. Panel VI. Access to justice, effective remedy and guarantees of non-repetition

92. The first panellist noted that a binding instrument must build on and complement existing international standards, such as the Guiding Principles. The remedy process should be sensitive to the experiences of different groups of rights-holders, requiring consideration of the gender dimension and preventing victimization of rights-holders and human rights defenders seeking remedies. Furthermore, rights-holders must be able to seek, obtain and enforce different types of remedies.

93. The second panellist suggested strengthening the provision on legal aid by establishing an online resource that would provide information to victims, such as the relevant law and the applicable burden of proof, and would link victims to NGOs and legal

aid. Additionally, the panellist noted the importance of recognition and enforcement of judgments.

94. The third panellist discussed how important it would be for victims to have access to courts in the home States of transnational corporations. To better confront problems such as piercing the corporate veil, he recommended reversing the burden of proof and improving victims' access to disclosure. He also suggested that damages should be based on home State calculations, the abolishment of the "loser pays" principle, and inclusion of proper cost-recovery mechanisms to encourage legal representation.

95. Delegations and NGOs welcomed the inclusion of that section in the document, noting that it was crucial to address gaps in legal protection and that doing so would constitute important added value in a future instrument. In particular, efforts to remove practical and legal barriers to effective access to justice were appreciated; however, some NGOs warned that by listing specific barriers, it could be excluding those not mentioned. It was suggested that the section should clearly state the right of everyone to have access to remedy regardless of the perpetrator.

96. A regional organization indicated that the assessment in the chapeau seemed acceptable but questioned whether the provisions mostly restated existing obligations. Another delegation suggested the complete removal of the section, arguing that a more holistic approach was warranted and that the current approach would force States to adopt a system that could be inappropriate in local circumstances. A business organization noted that the root problem regarding access to justice was a lack of the rule of law, and the instrument would need to find ways of incentivizing States to implement existing obligations.

97. States and many NGOs appreciated the inclusion of a provision emphasizing the need for access to justice for vulnerable groups; however, it was suggested that more empowering and positive language should be employed. Some NGOs recommended the inclusion of language about the need for gender-sensitive access to justice and remedies. An NGO also suggested that language from the United Nations Declaration on the Rights of Indigenous Peoples should be included, in particular to recognize the different legal systems and customs of certain communities. One delegation was concerned that specific groups were being recognized at all, indicating that there would be unfair and special treatment for those listed. A panellist disagreed, arguing that fairness dictated that different groups be treated differently.

98. Clarification was requested regarding the provision concerning non-judicial mechanisms not being a substitute for judicial mechanisms. It was mentioned that recourse to non-judicial mechanisms could be in the interest of victims, as they were sometimes faster and more appropriate. One panellist agreed that non-judicial mechanisms had a role to play, but argued that they were complementary, noting that judicial mechanisms should always be available.

99. Several NGOs appreciated the provision on reducing regulatory, procedural and financial obstacles in access to remedy, in particular mentioning the importance of ensuring class actions, access to information and limiting *forum non conveniens*. Many welcomed the inclusion of a provision concerning the reversal of the burden of proof; however, one business organization argued that that provision would upset the fair balance among the parties and potentially violate due process. Panellists disagreed, noting that, in some cases, raising a displaceable presumption would be appropriate, and that reversing the burden of proof existed in some national systems.

100. Several delegations and NGOs welcomed a provision addressing the need to guarantee the security of victims, witnesses and human rights defenders, although it was questioned whether the provision went beyond what States were already obliged to do.

NGOs thought the provision could be stronger by prohibiting interference with human rights defenders, and giving defenders a legal claim if they experienced retaliation.

101. States and NGOs also expressed support for a number of other provisions, including on the different forms of remedy, the right to equality of arms and legal aid, and access to information relevant to substantiating claims.

102. Multiple NGOs suggested that a provision addressing piercing of the corporate veil should be explicitly included in the section.

G. Panel VII. Jurisdiction

103. While the first panellist welcomed the inclusion of a section on jurisdiction, she noted that a number of key concepts related to State obligations still needed clarification. She stressed that international law already allowed the exercise of prescriptive jurisdiction extraterritorially, and careful language should be employed to avoid a restrictive interpretation. In her view, enforcement jurisdiction should be given careful attention and should be addressed in the section on international cooperation.

104. The second panellist expressed serious caution with regard to the broad approach to the concept of jurisdiction adopted in the elements document and warned that asserting extraterritorial jurisdiction over entities with a tenuous connection to the forum State could raise issues related to the principles of international comity and exhaustion of local remedies. He noted that enforcement of existing legislation remained an issue and attention should be focused on strengthening incentives to enforce those laws.

105. The third panellist argued that States should address accountability gaps related to transnational corporations by recognizing jurisdiction over national companies whose activities had an impact abroad, and the instrument should clearly indicate when a cause of action arose in the home State. Additionally, barriers to accessing justice should be removed, in particular the doctrine of *forum non conveniens* since it was often used as a delaying and obstructive tactic.

106. Delegations and NGOs agreed on the importance of having a section on jurisdiction in the elements document as many transnational corporations and other business enterprises escaped liability through jurisdictional challenges. The section was considered essential to address accountability gaps, clarify when courts could consider claims for abuses occurring abroad and enhance victims' access to justice. Given the importance of that section, some delegations emphasized the need for clarity. While many found that the elements formed a good starting point, calls were made for more precision in the provisions. For instance, some questioned the contours of the definition of "under the jurisdiction" in the chapeau, asking for clarity as to the meaning of "substantial activities in the State concerned" and the extent of control needed by parent companies. Some NGOs called for coherence among the concepts in that section and references to "territory and/or jurisdiction" elsewhere in the document, as well as the reaffirmation in the "purpose" section that State obligations did not stop at their territorial borders.

107. Most of the discussion centred on whether the language should permit extraterritorial jurisdiction and the extent of that jurisdiction. Several delegations and NGOs found it crucial that the instrument permit courts to consider claims arising out of activities abroad. Those delegations indicated that the use of extraterritorial jurisdiction had been approved by a range of judicial bodies and instruments, including national court cases, treaties and other international instruments. Other delegations suggested that clear references to the bases for jurisdiction should be included. In their view, under international law, extraterritorial jurisdiction could only be invoked exceptionally, duly justified by a legitimate interest and when a real and substantial link existed between a forum and the parties and claims concerned. That could be based on prescriptive jurisdiction principles,

such as nationality, passive personality and the protective principle. Going beyond traditional bases of jurisdiction could raise several issues. For instance, too much reliance on home State jurisdiction could act as a disincentive for host States in ensuring access to justice. Additionally, an expansive view of jurisdiction had the potential to violate the territorial integrity and sovereign equality of States, principles which were reaffirmed in the preamble of the elements document. However, panellists considered that those risks were overstated as that section did not authorize extraterritorial enforcement jurisdiction, and risks associated with such jurisdiction were allayed with the inclusion of a section on international cooperation.

108. With respect to specific provisions, delegations expressed most concern with the provision authorizing jurisdiction over subsidiaries throughout the supply chain domiciled outside States' jurisdiction. Additionally, concern was raised about the provision permitting jurisdiction over abuses alleged to have been committed by transnational corporations and other business enterprises throughout their activities, including their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them. They argued that that wording was too broad and could cover legal entities with little connection to the forum State.

109. Clarification was sought as to the provision permitting claims by victims within a State's jurisdiction. It was queried whether that referred to nationals, residents or something else.

110. Additionally, it was proposed that certain provisions be added to that section. Some delegations and NGOs suggested explicitly prohibiting the use of *forum non conveniens*. Another delegation and NGO recommended adding a provision to address the conflict of laws. Calls were made to address conflict situations, as local courts were often unavailable in situations of armed conflict. One delegation suggested that jurisdiction over online enterprises be addressed. Furthermore, it was proposed that universal jurisdiction be established for conduct constituting international crimes.

H. Panel VIII. International cooperation

111. The first panellist noted the importance of that section given our globalized, fragmented economy. He suggested two ways to strengthen that section. First, by including subsections addressing cooperation in investigative, prosecutorial, administrative systems, and criminal and civil court systems separately. Second, by establishing a public register to help with the coordination of research.

112. The second panellist discussed how cooperation should generally address treaty implementation, helping States with national implementation and enforcement of judgments. To ensure appropriate cooperation, States should (a) ensure access to information for investigatory functions, (b) adopt rules to ensure mutual judicial cooperation, (c) ensure adequate standards of due process, (d) consider reflecting the principle of comity in the instrument, and (e) draw inspiration from existing instruments and standards.

113. Many delegations and NGOs agreed on the importance of international cooperation. One of the main obstacles to effective regulation of transnational corporations was the fact that they operated in multiple jurisdictions; thus, cooperation between States was necessary to ensure abuses were properly addressed. NGOs shared cases in which victims were unable to obtain redress due to a lack of international cooperation. Major obstacles to justice for those victims, such as difficulties in obtaining information, could be rectified with proper cooperation among States. Thus, it was important for States to agree on certain standards to ensure efficient investigation, prosecution and enforcement. Some delegations referred to other processes and instruments for guidance, such as the United Nations

Convention against Transnational Organized Crime and the United Nations Convention against Corruption. One delegation also said that regulating the recognition and enforcement of foreign judgments under the treaty should not overlap with the work being undertaken at the Hague Conference on Private International Law.

114. One delegation and a business organization argued that international cooperation should be developed generally and not focus on the specific regime. There was a fear that developing new obligations on international cooperation could conflict with other processes or send contradictory messages as to United Nations standards and its broader activities. Instead, States should focus on strengthening existing international cooperation mechanisms and continue to develop national action plans. Another delegation stressed that enhancing international cooperation could also benefit businesses. Furthermore, efforts should be taken to increase peer pressure among States to strengthen implementation of the Guiding Principles.

115. A regional organization stressed its advocacy for increased mutual legal assistance, including for cross-border investigation. It noted that the provisions under that chapter were interesting; however, it mentioned that already much was being done, for instance the work of the OHCHR accountability and remedy project on cross-border cooperation. It also questioned how the provisions in that section would allow for implementation given the current constraints, such as the lack of resources of prosecutors' offices to investigate cases involving transnational corporations and other business enterprises. Some delegations and a panellist suggested that provisions on technical assistance could be included to address some of those challenges.

116. Delegations called for greater specificity in the provisions of that section, taking into account that different levels of cooperation were required. There were multiple suggestions to differentiate the section based on whether cooperation was needed for civil, criminal or administrative matters, and to include more precise provisions on the means of cooperation needed for these different types of regimes. Additionally, there were calls for more detail into what processes should be required, in particular for evidence collection and sharing, and reciprocal recognition of civil judgments. It was also noted that a provision should be included to ensure reciprocity among States.

I. Panel IX. Mechanisms for promotion, implementation and monitoring

117. The first panellist suggested that drafters focus on four principles in that section. First, accountability, lessons on which could be drawn from processes regulating business conduct outside of the human rights context, such as the World Bank Inspection Panel. Second, transparency, given the importance of access to information. Third, participation, although caution should be exercised regarding abuse by the private sector. Fourth, cooperation, which should be ensured at the national, regional and international levels.

118. The second panellist discussed cases in which victims were unable to access justice through existing institutions. She argued for the creation of an international court for affected individuals and communities to hold transnational corporations accountable. While supportive of the creation of an ombudsman, as proposed in the elements, she claimed that that would not be an adequate substitute for an international judicial body.

119. The third panellist welcomed that section in the elements document and noted that international mechanisms were needed. Implementation lay foremost with national jurisdictions, but a complementary, properly resourced international court should exist when national jurisdictions fail. The treaty body proposed in the elements would also be welcome and should be endowed with the ability to make recommendations, as well as referrals to the international court.

120. Several delegations and NGOs welcomed the inclusion of that section and the creation of mechanisms to promote, implement and monitor a future instrument. Many called for the ability of victims to directly access those mechanisms, and an additional provision to protect against retaliation by those who engaged those mechanisms was mentioned. Some argued that, without enforcement mechanisms, the instrument would not be properly implemented. Other delegations questioned the usefulness of creating a new mechanism, arguing that the focus should be on strengthening existing institutions. One delegation reiterated that States had the prerogative to decide on how to enforce its treaty commitments. It was also noted that there should be more reliance on national action plans in order to bring the treaty to the national level. One delegation asked how the instrument could strengthen non-judicial mechanisms and what the role of national human rights institutions could be in that regard.

121. Several delegations approved of the establishment of an international judicial mechanism to hear complaints regarding violations by transnational corporations, including through the establishment of special chambers in already existing regional courts, noting that victims and certain States had been calling for the creation of such institutions for some time. However, questions were raised as to whether an international court could be effective or delay negotiations for years, and there were concerns regarding budgetary and political issues involved with establishing a court. A question was asked whether that referred to past deliberations over the International Criminal Court, whether it was an appeal to broaden the jurisdiction of the Court and whether the proposal was feasible.

122. Delegations expressed support for the creation of an international committee to monitor the treaty, and it was noted that the creation of a committee would not preclude the creation of other institutions or the involvement of national human rights institutions and ombudspersons. Some delegations approved of the proposed functions of that committee in the elements, including examining periodical reports and individual and collective communications. It was suggested that that body should consider victims as its centre of attention, and that it could foster international cooperation, technical assistance and share best practices. An expectation for a draft text of the treaty by the Chair-Rapporteur in the next session was highlighted.

123. Additionally, some delegations proposed the establishment of a non-judicial, peer review mechanism, and some NGOs suggested creating a monitoring centre that could be jointly run by States and civil society.

J. Panel X. General provisions

124. One NGO welcomed a provision in the section on general provisions regarding the primacy of a future instrument over other obligations from trade and investment legal regimes. It also stressed the importance of allowing for the participation of civil society and affected communities.

K. Panel. Victims' voices

125. Five panellists provided introductory remarks, commenting on a range of issues, including violations of indigenous peoples' rights, abusive practices in drug patenting and pricing, harm caused by agricultural projects, impunity relating to toxic pollution, development projects displacing communities and the role of international financial institutions in supporting harmful practices.

126. The panellists' presentations were followed by interventions from delegations and NGOs, highlighting specific cases of abuse and State failure to implement existing human rights obligations. Some delegations defended the adoption of a balanced, victim-centred

document. It was highlighted that States should participate in that process and not stop codifying just because existing treaties were not implemented. There was a call for strengthening existing institutions and implementation of existing instruments, such as the Guiding Principles; guidance in that regard could be drawn from initiatives such as the OHCHR accountability and remedy project. Others expressed the view that existing institutions and instruments were failing to ensure the protection of victims, and that the creation of a legally binding instrument to oblige States and transnational corporations and other business enterprises to comply with human rights standards, and the creation of mechanisms to enforce such obligations, were necessary to address shortcomings in the current system. Delegations and NGOs stressed the importance of victims' participation in those processes, the need to ensure that they obtained redress when their rights were violated, and the importance of protecting human rights defenders. One regional organization stated that those who had suffered human rights violations by States, as well as those that were victims of abuses by non-State actors, had a right to access justice and a right to effective remedy, and insisted that States must implement existing obligations.

V. Recommendations of the Chair-Rapporteur and conclusions of the working group

A. Recommendations of the Chair-Rapporteur

127. **Following the discussions held during the first three sessions of the working group, in particular the discussion on the elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights presented by the Chair-Rapporteur, and pursuant to its mandate, as defined in paragraph 1 of resolution 26/9, and acknowledging the different views expressed, the Chair-Rapporteur should:**

(a) **Invite States and different stakeholders to submit their comments and proposals on the draft elements document no later than the end of February 2018;**

(b) **Present a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights, on the basis of the contributions from States and other relevant stakeholders, at least four months before the fourth session of the Working Group, for substantive negotiations during its fourth and upcoming annual sessions until the fulfilment of its mandate;**

(c) **Convene a fourth session of the Working Group to be held in 2018 and undertake informal consultations with States and other relevant stakeholders on its programme of work.**

B. Conclusions of the working group

128. **At the final meeting of its third session, on 27 October 2017, the working group adopted the following conclusions, in accordance with its mandate established by resolution 26/9. The Working Group:**

(a) **Welcomed the opening messages of the United Nations High Commissioner for Human Rights and of the President of the Human Rights Council and thanked the Minister for Foreign Affairs of Ecuador, Maria Fernanda Espinosa Garcés, and the Member of the French National Assembly, Dominique Potier, for their participation as keynote speakers. It also thanked the independent experts and representatives who had taken part in panel discussions, the interventions, proposals and comments received from Governments, regional and political groups,**

intergovernmental organizations, civil society, NGOs and all other relevant stakeholders, which had contributed to the substantive discussions of the session;

(b) Took note of the elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights, prepared by the Chair-Rapporteur in accordance with paragraph 3 of resolution 26/9 and the substantive discussions and negotiations and the presentation of various views thereof;

(c) Requested the Chair-Rapporteur to undertake informal consultations with States and other relevant stakeholders on the way forward on the elaboration of a legally binding instrument pursuant to the mandate of resolution 26/9.

VI. Adoption of the report

129. **At its 10th meeting, on 27 October 2017, after an exchange of different views on the report and some of its elements, the working group adopted *ad referendum* the draft report on its third session and decided to entrust the Chair-Rapporteur with its finalization and submission to the Council for consideration at its thirty-seventh session.**

Annex I

List of participants

States Members of the United Nations

Algeria, Angola, Argentina, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Bolivia (Plurinational State of), Botswana, Brazil, Burundi, Central African Republic, Chile, China, Colombia, Costa Rica, Croatia, Cuba, Cyprus, Czechia, Democratic Republic of the Congo, Ecuador, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Haiti, Honduras, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Côte d'Ivoire, Jamaica, Jordan, Kazakhstan, Kenya, Lesotho, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malta, Mauritania, Mexico, Monaco, Morocco, Mozambique, Myanmar, Namibia, Netherlands, Nicaragua, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Portugal, Qatar, Republic of Korea, Republic of Moldova, Russian Federation, Rwanda, Saudi Arabia, Serbia, Singapore, Slovakia, Slovenia, Somalia, South Africa, Spain, Sudan, Sweden, Syrian Arab Republic, Switzerland, Thailand, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, Uruguay, Venezuela (Bolivarian Republic of), Zambia.

Non-member States represented by an observer

Holy See, State of Palestine.

United Nations funds, programmes, specialized agencies and related organizations

United Nations Conference on Trade and Development.

Intergovernmental organizations

European Union, International Chamber of Commerce, International Development Law Organization, Organisation of Islamic Cooperation, South Centre.

Special procedures of the Human Rights Council

Working Group on the issue of human rights and transnational corporations and other business enterprises, Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Independent Expert on the promotion of a democratic and equitable international order.

National human rights institutions

The National Human Rights Council of Morocco, German Institute for Human Rights, Danish Institute for Human Rights.

Non-governmental organizations in consultative status with the Economic and Social Council

Academic Council on the United Nations System; Al-Haq: Law in the Service of Man; American Bar Association; Amnesty International; Asia Pacific Forum on Women, Law

and Development (APWLD); Association for Women's Rights in Development (AWID); Centre Europe — Tiers Monde — Europe-Third World Centre (CETIM); Center for International Environmental Law (CIEL); Comité Catholique contre la Faim et pour le Développement (CCFD); Conectas Direitos Humanos; Coopération Internationale pour le Développement et la Solidarité (CIDSE); Corporate Accountability International (CAI); Fondation pour l'étude des relations internationales et du développement; FIAN International e.V.; Franciscans International; Friends of the Earth International; Geneva Infant Feeding Association; Global Policy Forum; Indian Movement "Tupaj Amaru;" Indigenous Peoples' International Centre for Policy Research and Education (Tebtebba); Institute for Policy Studies (IPS); Instituto Para la Participación y el Desarrollo-INPADE-Asociación Civil; International Association of Democratic Lawyers (IADL); International Commission of Jurists; International Federation for Human Rights Leagues (FIDH); International Institute of Sustainable Development; International Organisation of Employers (IOE); International Service for Human Rights (ISHR); International Trade Union Confederation; IT for Change; iuventum e.V.; Legal Resources Centre; Oxfam International; Public Services International (PSI); Réseau International des Droits Humains (RIDH); Sikh Human Rights Group; Social Service Agency of the Protestant Church in Germany; Society for International Development; Stichting Global Forest Coalition; Swiss Catholic Lenten Fund; Tides Center; Verein Sudwind Entwicklungspolitik; Women's International League for Peace and Freedom (WILPF).

Annex II

List of panellists and moderators

Monday, 23 October 2017

Keynote speakers

- H.E. María Fernanda Espinosa, Minister of Foreign Affairs of Ecuador, and former Chairperson-Rapporteur of the open-ended intergovernmental working group
- Dominique Potier, Member of the French National Assembly

Subject I — General framework (15:00–18:00)

- Lola Sánchez, Member of the European Parliament
- Richard Kozul-Wright, Director of the Division of Globalization and Development Strategies, UNCTAD
- Vicente Yu, Deputy Executive Director, South Centre

Tuesday, 24 October 2017

Subject II — Scope of application (10h00–13h00)

- Kinda Mohamedieh, South Centre
- Sigrun Skogli, Professor, University of Lancaster
- Manoela Roland, Professor, Universidade Federale de Juiz de Fora

Subject III — General obligations (15h00–18h00)

- Olivier De Schutter, Professor, Université de Louvain
- Linda Kromjong, Secretary-General of the International Organization of Employers
- David Bilchitz, Professor, University of Johannesburg and Director, South African Institute of Advances Constitutional, Public, Human Rights and International Law
- Makbule Sahan, representative of the International Trade Union Confederation

Wednesday, 25 October 2017

Subject IV — Preventive measures (10h00–13h00)

- Baskut Tuncak, UN Special Rapporteur on hazardous substances and wastes
- Iván González, representative of the Confederación Sindical de Trabajadores de las Américas, CSA
- Ana María Suárez-Franco, FIAN International

Subject V — Legal liability (10h00–13h00)

- Richard Meeran, Partner, Leigh Day & Co.
- Carlos López, International Commission of Jurists
- Humberto Cantú Rivera, Professor, University of Monterrey

Subject VI — Access to justice, effective remedy and guarantees of non-repetition (15h00–18h00)

- Surya Deva, Chairperson of the United Nations Working Group on Business and Human Rights
- Gilles Lhuilier, Professor, Ecole Normale Supérieure (ENS) Rennes, France
- Richard Meeran, Partner, Leigh Day & Co.

Thursday, 26 October 2017

Subject VII — Jurisdiction (10h00–13h00)

- Sandra Epal Ratjen, International Advocacy Director, Franciscans International
- Lavanga Wijekoon, Littler Mendelson
- Gabriela Quijano, Amnesty International

Subject VIII — International cooperation (10h00–13h00)

- Harris Gleckman, Center for Governance and Sustainability, University of Massachusetts, Boston
- Vicente Yu, Deputy Executive Director, South Centre

Subject IX — Mechanisms for promotion, implementation and monitoring (15h00–18h00)

- Baskut Tuncak, UN Special Rapporteur on hazardous substances and wastes
- Anne van Schaik, Friends of the Earth Europe
- Melik Özden, CETIM

Subject X — General provisions (15h00–18h00)

Friday, 27 October 2017

Panel — The voices of the victims (selected cases from different sectors and regions) (10h00–13h00)

- Alfred de Zayas, United Nations Independent Expert on the promotion of a democratic and equitable international order
- Lorena di Giano, Red Latinoamericana por el Acceso a los Medicamentos
- Mohamed Hakech, La Via Campesina MENA region
- Maria del Carmen Figueroa, Asamblea Nacional de Afectados Nacionales
- Hemantha Withanage, Friends of the Earth — CEJ